

1 UNITED STATES OF AMERICA  
2 SOUTHERN DISTRICT OF ILLINOIS

3 CATHERINE ALEXANDER, )  
4 Plaintiff, )  
5 v. ) No. 3:18-cv-00966-SMY  
6 TAKE-TWO INTERACTIVE SOFTWARE, )  
7 INC., et al., ) *East St. Louis, IL*  
8 Defendants. )

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11 TRANSCRIPT OF JURY TRIAL PROCEEDINGS  
12 DAY 1 OF 5

13 BEFORE THE HONORABLE STACI M. YANDLE  
14 UNITED STATES DISTRICT JUDGE

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20  
21 September 26, 2022

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1 (Proceedings continued in open court at 2:20 p.m.,  
2 subsequent to voir dire proceedings, jury present.)

3 COURTROOM DEPUTY: If the jurors will remain  
4 standing, please, and everyone else can be seated.

5 (Jury sworn by courtroom deputy.)

6 THE COURT: Ladies and gentlemen of the jury, we  
7 are about to begin the trial of the case you heard about  
8 during jury selection. And before trial begins, I am going  
9 to give you instructions that will help you to understand  
10 what will be presented to you and how you should conduct  
11 yourselves during trial.

12 Soon, you will hear the lawyers' opening statements  
13 in which they may explain to you the issues in the case and  
14 summarize the facts that they expect the evidence will  
15 show. Then, witnesses will be called to testify under oath  
16 and the evidence will begin. The witnesses will be  
17 examined and cross-examined by the attorneys.

18 After all the evidence is in, the lawyers will have  
19 the opportunity to make final arguments. The opening and  
20 final statements made by the attorneys are not to be  
21 considered as evidence in the case or as your instruction  
22 on the law. Nevertheless, these statements and arguments  
23 are intended to help you properly understand the issues,  
24 the evidence, and the applicable law, so you should give  
25 them your close attention. Before final arguments are made

1 by the attorneys, I will instruct you on the law.

2 You should give careful attention to the testimony  
3 and other evidence as it is received and presented for your  
4 consideration, but you should not form or express any  
5 opinion about the case until you have received all the  
6 evidence, the arguments of the attorneys, and the  
7 instructions on the law from me. In other words, you  
8 should not form or express any opinion about the case until  
9 you retire to the jury room to consider your verdict.

10 From time to time, the lawyers and I may have  
11 conferences on headsets and outside of your hearing. These  
12 are called sidebar conferences. During sidebars, court is  
13 in session and I ask then that you not talk among  
14 yourselves.

15 The lawyers are trained in the rules of evidence  
16 and trial procedure. It is their duty to make all  
17 objections they feel are proper. When a lawyer makes an  
18 objection, I will either overrule or sustain the objection.  
19 If I overrule the objection, the witness will not answer  
20 and you must not speculate on what might have happened or  
21 what the witness might have said had I permitted the  
22 witness to answer the question. You should not draw any  
23 inference from the question itself.

24 I also ask that you not have any contact with the  
25 lawyers in this case or with any of the parties or the

1 witnesses. That includes any kind of exchange of words. I  
2 have asked the lawyers not to communicate with you, so if  
3 you see them around the building and they don't speak or  
4 talk to you, please don't think they are being rude or  
5 unfriendly. They are simply following the Court's  
6 instructions.

7           You, as jurors, must decide this case based solely  
8 on the evidence presented here within the four walls of  
9 this courtroom. This means that during the trial you must  
10 not conduct any independent research about the case, the  
11 matters in the case, and the individuals or organizations  
12 involved in the case. In other words, you should not  
13 consult dictionaries or reference materials, search the  
14 internet, websites, blogs, or use any other electronic  
15 tools to obtain information about this case or to help you  
16 decide the case. Please do not try to find out information  
17 from any source outside of the confines of this courtroom.

18           Until you retire to deliberate, you may not discuss  
19 this case with anyone, even your fellow jurors. After you  
20 retire to deliberate, you may begin discussing the case  
21 with your fellow jurors, but you cannot discuss the case  
22 with anyone else until you have returned a verdict and the  
23 case is at an end.

24           You must not talk to anyone about this case or use  
25 tools of technology -- cell phones, Blackberries, iPhones,

1 or the internet -- to communicate electronically with  
2 anyone about the case. This includes your family and  
3 friends. You may not communicate with anyone about the  
4 case on your cell phone, through e-mail, text messaging, or  
5 on Twitter, through any blog or website, through any  
6 internet chat room, or by way of any other social  
7 networking websites, including Facebook, LinkedIn and  
8 YouTube.

9           You have the right to take notes during the course  
10 of this trial if you choose to do so. Notepads will be  
11 provided for your convenience. No one else will be allowed  
12 to look at your notes. You do not have to take notes.  
13 That's entirely up to you. I have no preference one way or  
14 the other. You may use your notes to refresh your memory  
15 at the appropriate time.

16           Your notes are for your own use only, not for any  
17 other jurors. Do not show them to anyone else at any time;  
18 that includes other jurors, and it also includes the time  
19 when you are deliberating on your verdict. Anytime you  
20 exit the courtroom, please leave your notebooks on your  
21 chair, except of course when you retire to deliberate.

22           You should rely on your own memory of the evidence.  
23 If your notes conflict with what you remember, or if  
24 someone else's notes conflict with your memory, you are  
25 free to use your own memory of the evidence. Just because



1 a juror has taken notes does not mean his or her memory of  
2 the evidence has any more weight or impact than the memory  
3 of a juror who has not taken notes.

4 At the end of the trial, when you are discharged  
5 from further service in this case, the notes will be  
6 collected by the courtroom deputy and will be destroyed.  
7 No one will be allowed to look at the notes before they are  
8 destroyed.

9 With that, we are prepared to proceed with opening  
10 statements. First, on behalf of the plaintiff.

11 MR. FRIEDMAN: Thank you, Your Honor.

12 Good afternoon. My name is Tony Friedman. I'm an  
13 attorney at The Simon Law Firm. And together with Mr.  
14 Simon and Mr. Tahan, who you were introduced to earlier, we  
15 have the honor and pleasure of representing Miss Catherine  
16 Alexander. And we thank each of you for your time and  
17 attention thus far today, and in advance for your time and  
18 attention throughout the week.

19 Ladies and gentlemen of the jury, this is an  
20 important and timely case. For generations, technology has  
21 changed the way that we live our lives, what products we  
22 purchase, and the way companies make and sell those  
23 products. Our economy, now more than ever, creates  
24 tremendous value and wealth not just from the ownership of  
25 physical property like farmland and steel plants and

1       railroads, but on the ownership and licensing of intangible  
2       or intellectual property like trademarks, patented  
3       technologies, and copyrights.

4               These human-made creations of art, science, and  
5       technology are every bit as valuable as land or gold. And  
6       just as your right to own your own farm is protected by a  
7       deed and a good fence, intellectual property is protected  
8       by the United States Constitution itself.

9               This case is about one type of intellectual  
10      property. Copyrights. A copyright is the exclusive legal  
11      right to reproduce or copy artistic expression like a  
12      literary work, a piece of music, or a painting. A  
13      copyright is actually a bundle of different rights which  
14      the copyright owner can license to different people or  
15      companies for different purposes.

16              For example, you could license your copyrighted  
17      photograph to a company to copy and use in their newspaper  
18      advertisements but not for their television advertisements.  
19      or you could license your song that you created to a record  
20      company but not license it to cover bands to play around  
21      town. Tattoos and tattoo art as artistic expressions are  
22      also protected by the copyright laws.

23              This case is about the tattoo artist Miss  
24      Alexander's copyrighted artwork in the medium of tattoos,  
25      and the defendants' use of her copyrights without

1 permission in ways never contemplated by Miss Alexander.

2 Miss Alexander's love of tattoo art began well  
3 before she got her first tattoo as a gift to herself, at  
4 the age of 18. She began studying as a tattoo artist at  
5 that time, at first as an apprentice, then an established  
6 artist in her own right. She's applied her art and craft  
7 across St. Louis at such tattoo shops as the Goldenlands  
8 and The Pain Station.

9 Randy Orton -- Mr. Orton -- who probably needs no  
10 introduction, may be the greatest professional wrestler of  
11 all time. He is the third generation in a dynasty of great  
12 professional wrestlers starting with his grandfather, Bob  
13 Orton, then to his father, Cowboy Bob.

14 Randy Orton has carried the torch to a level  
15 beyond. He became the youngest heavyweight champion at the  
16 age of 24. Mr. Orton's on-screen feuds with the  
17 Undertaker, for example, are legendary. And he made famous  
18 his signature finishing move, the RKO -- the Randy Knockout  
19 -- which I won't even attempt to explain.

20 In 2003, Mr. Orton was just at the start of his  
21 professional career. After he completed wrestling school,  
22 Mr. Orton came into the Goldenlands tattoo shop asking to  
23 be tattooed. Miss Alexander agreed to take him on as a  
24 client. At that time, Mr. Orton had a, quote/unquote,  
25 flash -- F-L-A-S-H -- flash piece of tribal tattoo on his

1 back. Flash is industry speak for a generic stenciled  
2 tattoo. Mr. Orton asked Miss Alexander to redo the tribal  
3 piece and to add new pieces to it. Miss Alexander did so,  
4 and expanded it using custom artwork that she created.

5 Mr. Zidzik, if you could bring up Plaintiff's Trial  
6 Exhibit No. 6, at page four.

7 We'd like to begin showing you some of the artwork  
8 that is at issue in this case.

9 Ladies and gentlemen, you are seeing the custom  
10 expanded artwork that I just explained, that Miss Alexander  
11 placed on Mr. Orton's back, the tribal expansion.

12 Mr. Orton, at that time, was pleased with this  
13 work. He and Miss Alexander became acquainted, even  
14 friends. Over the next six years, from 2003 through 2009,  
15 Miss Alexander inked at least five more tattoos on Mr.  
16 Orton, and countless touch-ups and edgings.

17 Mr. Orton followed Miss Alexander from the  
18 Goldenlands tattoo shop to The Pain Station, and Miss  
19 Alexander became for that time period Mr. Orton's tattoo  
20 artist.

21 And her tattoos speak for themselves.

22 Mr. Zidzik, could you pull up Plaintiff's Trial  
23 Exhibit No. 10.

24 These are depictions of the tribal tattoos that  
25 Miss Alexander inked on Mr. Orton's left and right arms.

1           Plaintiff's Exhibit No. 9, please, at page four.

2       These are the skulls. These are skull tattoos that go up  
3       and down both of Mr. Orton's arms.

4           Plaintiff's Exhibit No. 7, please. This is the  
5       dove tattoo inked in 2008. This dove tattoo is featured on  
6       Mr. Orton's left arm just at the elbow.

7           Exhibit 8, please, page four. And this is referred  
8       to as the rose tattoo. This appears on Mr. Orton's right  
9       arm.

10          These are the five tattoos that Miss Alexander  
11       created and inked on Mr. Orton that are the subject of this  
12       action. The five copyrighted tattoos.

13          Miss Alexander knew at that time that Mr. Orton was  
14       a rising star in the WWE. While she was his tattoo artist  
15       in the 2000s, Mr. Orton was becoming a WWE fan favorite.  
16       And during that time, Mr. Orton went through his famous  
17       feud with the Undertaker, a beef which propelled his career  
18       even further. And by the time he RKO'd the Undertaker, he  
19       was a household name. And Miss Alexander continued to  
20       create unique art to adorn his body.

21          Miss Alexander knew that Mr. Orton was a celebrity.  
22       She knew he was often photographed and appeared on  
23       television shirtless, showing off his tattoos and his  
24       physique. Mr. Orton even gave Miss Alexander tickets to  
25       some of his live events. Miss Alexander was paid for her

1 labor and for her time. But Mr. Orton never took ownership  
2 of the copyrights. He never owned the designs and the art  
3 themselves.

4 The ownership of those copyrights -- the right to  
5 copy the five pieces of art -- remained at all times with  
6 Miss Alexander. This was true in 2009 when Miss Alexander  
7 and Mr. Orton parted ways, and it is still true today.

8 Now, you all know by now that this case is about  
9 video games. So, you may be wondering how we get from the  
10 normal interactions between a tattoo artist and a customer  
11 to a federal case against the WWE and a publicly-traded  
12 technology holding company.

13 Ladies and gentlemen, that part of the story is  
14 about the copyrights; the licensing and infringement and  
15 the business transactions that occur around these valuable  
16 assets.

17 Mr. Orton is a WWE wrestler. He's not a party to  
18 this lawsuit. Miss Alexander has not and did not sue Mr.  
19 Orton for anything.

20 As a wrestler, Mr. Orton signed a contract to give  
21 the WWE permission to use his intellectual property, his  
22 likeness, for WWE business purposes. This includes the  
23 obvious reasons like when casting Mr. Orton in the WWE  
24 events on television or on DVDs, but it also gives the WWE  
25 the exclusive rights to make more products, exploiting Mr.

1     Orton's likeness to sell more products to its fan base.  
2     That's the WWE's business model.

3             For example, the WWE may license its logos and  
4     content to Fox, and allow Fox to broadcast Wrestlemania for  
5     a fee. And the WWE did just that. It licensed its vast  
6     intellectual property assets, its logos, its characters,  
7     its set designs, even its unique storylines and themes,  
8     and, yes, its copyrights, and, yes, Mr. Orton's likeness,  
9     to the video game companies in this lawsuit, the  
10    defendants, who are Take-Two Interactive, 2K Games, 2K  
11    Sports, and Visual Concepts.

12            The Take-Two entities are in the business of  
13    creating video games. And a licensing and development deal  
14    was struck between Take-Two and the WWE to create  
15    sports-themed wrestling games that take place in the WWE  
16    universe.

17            Take-Two sought this license from the WWE, which is  
18    not uncommon in the video game industry, because the WWE  
19    universe also comes with its own dedicated fan base, some  
20    of which will certainly also want to buy WWE-themed video  
21    games.

22            Take-Two started making the 2K wrestling games in  
23    about 2013 and they have been successful. They just  
24    released the WWE 2K22 game earlier this year. This case,  
25    the reason we are here today, is concerning the three

1 particular games: The WWE 2K16, 17, and 18.

2 Now, when the WWE licensed its intellectual  
3 property to Take-Two to make video games, it could only  
4 license what it actually owned. The WWE did not and does  
5 not own the copyrights for the tattoos that Miss Alexander  
6 created. Miss Alexander owns them. She owns the exclusive  
7 right to copy and reproduce the art that she created. WWE  
8 never got a license from Miss Alexander to copy her art  
9 into video games or elsewhere. And the WWE could,  
10 therefore, not have granted such a license to Take-Two.

11 Nevertheless, Take-Two and the WWE proceeded to  
12 copy and reproduce Miss Alexander's artwork into the 2K16,  
13 17, and 18 video games without Miss Alexander's permission,  
14 and sold and distributed over 10 million copies of just  
15 these three games alone, all of which contain copies of  
16 Miss Alexander's art, making hundreds of millions of  
17 dollars in the process.

18 Not being a video game person, Miss Alexander found  
19 out about this much later when a friend of hers told her  
20 that her art appeared in one of the video games and was  
21 realistic and lifelike. Miss Alexander did a search, and  
22 was shocked by how realistic her tattoos were. How  
23 authentic they were. She was shocked that her artwork had  
24 been copied, and copied identically into the video games  
25 without her permission and without any compensation.



1           She later filed this lawsuit against the WWE and  
2 Take-Two to protect her art and, as this is her only avenue  
3 to protect her art, to seek compensation.

4           To give you a brief preview of what some of the  
5 evidence will look like and we'll show in this case, let's  
6 look at some of the ways that Miss Alexander's art is  
7 copied into the subject video games.

8           Mr. Zidzik, could you pull up Plaintiff's Exhibit  
9 153 which is a video. And we'd like to play a minute  
10 portion of it starting at 7 minutes and 7 seconds.

11           (Video playing.)

12           Ladies and gentlemen, there is no audio for this  
13 video.

14           We can see what we saw previously, the dove tattoo,  
15 the tribal sleeves and the skulls, appearing on a custom  
16 character's right and left arms. I will also tell you that  
17 the video you are watching represents recorded gameplay  
18 from the WWE 2K16 game.

19           In addition, now you can see the tribal tattoo on  
20 the Custom Superstar's back.

21           (End of video.)

22           What we just showed you, that one-minute section,  
23 depicts the tattoo creator module in which Miss Alexander's  
24 artwork may be put onto any custom character, manipulated  
25 and changed, and then utilized as an asset throughout the

1 video game.

2 Mr. Zidzik, could you play additionally at --  
3 starting at minute marker 9 minutes and 20 seconds.

4 And, members of the jury, what we'll show you here  
5 is a depiction of a portion of a match in which the custom  
6 wrestler -- who you can see on the left, who is called  
7 Superstar -- is playing a wrestling match against the Randy  
8 Orton character that appears in the video game. The Custom  
9 Superstar, again, is wearing copies of the tattoos at issue  
10 in this case. Here is an example of the gameplay from WWE  
11 2K16.

12 (Video playing.)

13 Members of the jury, the tattoos in the video  
14 games, Miss Alexander's artwork, may be selected and copied  
15 onto custom players, manipulated into different colors, and  
16 are also featured as they are in real life on the Orton  
17 character.

18 These tattoos in the video games, these pieces of  
19 art, are not -- are not photographic representations of Mr.  
20 Orton that also happened to show his tattoos, nor are they  
21 videos of Mr. Orton, nor are they television or other  
22 broadcast of Mr. Orton. In no way is anybody suggesting  
23 that anything Mr. Orton does in his career or with his body  
24 can in any way be controlled by Miss Alexander.

25 video games, however, are entirely different from,

1 for example, photographs. The video game characters are  
2 not photographs. Nor are they videos. They are  
3 mathematical polygons that are digitally covered not in  
4 skin or photos but in textures. They are copies. They are  
5 creations made for the video game. And for wrestling fans  
6 to want to buy them, they are made as authentic and  
7 realistic as possible. That's the sales pitch,  
8 authenticity, realism. This character is a good copy of  
9 Mr. Orton and his tattoos, as good as technology will  
10 allow, but it is still an unauthorized copy.

11 Take-Two copied and reproduced Miss Alexander's art  
12 into the video games to achieve authenticity and ultimately  
13 to drive sales. These five defendant corporations did this  
14 without picking up the phone or paying Miss Alexander one  
15 red cent for her artwork, even though, the evidence will  
16 show, they knew about Miss Alexander's copyrights and her  
17 desire to protect them.

18 we will also show that the defendants, who  
19 themselves rely heavily on the copyright laws to protect  
20 their businesses, don't always take copyrighted material  
21 without permission. It depends. They have even licensed  
22 from tattoo artists for the created content section of the  
23 wrestling games, like what you saw earlier with the custom  
24 characters.

25 Now, let's talk a little bit about the claims that

1 Miss Alexander is bringing against the defendants. In this  
2 case, the defendants copied Miss Alexander's copyrighted  
3 tattoos into the 16, 17, and 18 video games without her  
4 permission. Miss Alexander's claims are simple: That WWE  
5 and Take-Two infringe her copyrights. And at the end of  
6 this case, there will be no question whatsoever that the  
7 defendants copied Miss Alexander's valid copyrights.

8 What is Miss Alexander seeking? She is seeking  
9 what she is entitled to under the U.S. Constitution and the  
10 copyright laws of the United States. She is seeking her  
11 actual damages and a portion of the defendants' profits.

12 I will talk to you more about that in just a few  
13 minutes.

14 What do we -- what does the plaintiff expect that  
15 the defendants will tell you about this case? We  
16 anticipate that they will say that even though they copied  
17 Miss Alexander's art into the video games, that there's  
18 actually no infringement. And we anticipate they'll offer  
19 up three reasons why they believe there is no infringement:  
20 License, fair use, and waiver.

21 On license. Take-Two may try to prove that Miss  
22 Alexander gave Mr. Orton an unwritten and implied license  
23 to copy the tattoos into video games, and that Mr. Orton in  
24 turn sublicensed that implied license to copy the tattoos  
25 into video games to the WWE, and then that the WWE in turn

1 sublicensed the right to copy the tattoos into video games  
2 to Take-Two.

3 For this, the defendants may try to prove that Miss  
4 Alexander intended for Mr. Orton to copy and distribute his  
5 tattoos and to sublicense that right to others.

6 We submit that the evidence will show, however,  
7 that Mr. Orton did not receive an implied license to make  
8 copies of the tattoos at all and, therefore, could not have  
9 given such a license to the WWE, who could not have sent it  
10 along to Take-Two to make video games.

11 What can Mr. Orton do with the tattoos on his body?  
12 Anything he wants. He can take photos of them. He can  
13 appear on television. He can appear in magazines. He can  
14 wrestle live at the convention center. But he did not get  
15 from Miss Alexander the right to make copies of his  
16 tattoos. Just as he did not get the right to make clothing  
17 using her artwork. Just as he did not get the right to  
18 make canvas prints of her artwork and sell those. And just  
19 as he did not get the right from Miss Alexander to open up  
20 his own tattoo shop and apply Miss Alexander's art onto new  
21 customers. That's copying and it's different from having  
22 his photo taken.

23 On the issue of fair use. The defendants may also  
24 try to prove that their use of Miss Alexander's art was  
25 fair use under the law and, therefore, okay. You may have

1 heard of the term fair use. And the judge may give you  
2 instructions on how to apply the law of fair use in this  
3 case.

4 But generally, fair use is --

5 THE COURT: No. No. No. The judge will give  
6 instructions and will define it for the jury at the  
7 appropriate time, counsel.

8 MR. FRIEDMAN: Thank you, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. FRIEDMAN: The judge will provide you with  
11 instructions on fair use, and instruction on how to apply  
12 the law of fair use to issues in this case.

13 An example of fair use: A teacher may make copies  
14 of a newspaper article to give to her students to read and  
15 discuss. That can be fair use.

16 THE COURT: Counsel, sidebar, please.

17 (Proceedings continued at the bench.)

18 THE COURT: Mr. Friedman?

19 MR. FRIEDMAN: Yes, Your Honor.

20 THE COURT: Okay. I have tried to give you some  
21 leeway, but I made it clear earlier today my expectation  
22 that counsel will not argue their cases in opening  
23 statement.

24 You may preview what the evidence will show.  
25 However, the evidence will not show the jury the definition

1 of fair use. That will come from the instructions on the  
2 law. And counsel should not and cannot in opening  
3 statements or anywhere else attempt to define those terms  
4 for the jury.

5 So, I'm going to ask you then to please stick to a  
6 preview of the factual evidence that you expect to present  
7 and what you expect for it to show in a nonlegal  
8 conclusion-type of way.

9 MR. FRIEDMAN: Thank you, Your Honor.

10 THE COURT: Okay. Do you need any clarification?

11 MR. FRIEDMAN: No, Your Honor.

12 THE COURT: Okay. Thank you.

13 (Proceedings continued in open court, jury  
14 present.)

15 MR. FRIEDMAN: Members of the jury, the evidence in  
16 this case on the issue of fair use, we contend, will prove  
17 that the use by the defendants was not fair based on a  
18 number of different factors.

19 The defendants copied Miss Alexander's art, not for  
20 scholarly purposes or for commercial gain. Realism and  
21 authenticity drive sales and profits. The tattoos  
22 themselves are artistic and involve skill and creativity.  
23 The kind of thing that merits copyright protection.

24 The defendants copied this art in their entirety,  
25 not just a sample or a portion of it, but the whole thing.

1 And if this kind of use is considered fair, then any  
2 potential market for tattoo artists to license their  
3 artistic creations will be destroyed.

4 THE COURT: Mr. Friedman?

5 MR. FRIEDMAN: Yes?

6 THE COURT: The facts won't show that. Do we need  
7 to clarify again?

8 MR. FRIEDMAN: No, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. FRIEDMAN: The evidence will show that the  
11 defendants' use of Miss Alexander's tattoos was not fair  
12 use to Miss Alexander and not fair use under the law.

13 Finally, on the issue of waiver. The defendants  
14 may try to prove that they're not liable under the  
15 copyright laws because Miss Alexander waived her rights to  
16 enforce her copyrights.

17 However, the evidence will show that Miss Alexander  
18 has never relinquished her copyrights and has sought in the  
19 past to enforce them. The evidence will show that this  
20 isn't her first run-in with the WWE about these very  
21 tattoos.

22 In 2009, Miss Alexander heard rumors that the WWE  
23 might be selling fake sleeves, fake shirt sleeves with  
24 copies of her tattoos on them. Basically, skin-colored  
25 shirts that feature the same tattoos that Miss Alexander



1 inked on Mr. Orton. She called the WWE to try to negotiate  
2 a licensing deal. She reached an authority on legal  
3 matters within the WWE. And Miss Alexander herself will  
4 explain that after she introduced herself as Mr. Orton's  
5 tattoo artist and inquired about the fake sleeves and a  
6 potential licensing deal, she was turned away and  
7 humiliated.

8           The sleeves never came to market, so she did not  
9 pursue the matter further. As a tattoo artist, when she  
10 learned the very same people plus a video game group had  
11 done it again, this time in video games, she acted within a  
12 reasonable time to bring suit, which is her only option to  
13 enforce her rights. She never voluntarily nor  
14 intentionally relinquished her right to assert her  
15 copyrights and has been litigating this case for now going  
16 on five years.

17           These three things are what we anticipate will be  
18 the defendants' defenses: Implied license, fair use, and  
19 waiver. And if the defendants cannot prove one or more of  
20 them to you, then you should find in favor of Miss  
21 Alexander.

22           Now, I mentioned previously that I would be talking  
23 a little bit about the damages that Miss Alexander is  
24 seeking and what the plaintiff intends to prove throughout  
25 the course of this trial. She is seeking both actual

1 damages and defendants' profits, a portion of which she is  
2 entitled to under the copyright laws.

3 Actual damages can be the value of the infringing  
4 work to the infringer and the defendant --

5 THE COURT: Mr. Friedman?

6 MR. FRIEDMAN: I'll move on.

7 Ladies and gentlemen of the jury, I am just an  
8 attorney. I'm not a video game designer. I'm not a video  
9 game expert. And I can't do any accounting. We hired a  
10 professor and an accountant to come here and explain to you  
11 how these things and these industries work, what the facts  
12 are, and to provide their opinions to you.

13 We hired Dr. Jose Zagal.

14 Dr. Zagal, could you stand?

15 WITNESS ZAGAL: (Complies.)

16 MR. FRIEDMAN: A professor in the nationally-ranked  
17 Entertainment Arts and Engineering Department at the  
18 University of Utah. He has a Ph.D in Computer Science from  
19 Georgia Institute of Technology; a Master's of Science in  
20 Engineering Sciences; and, a Bachelor's of Science in  
21 Industrial Engineering.

22 Dr. Zagal has offered books on video game design  
23 and numerous scholarly articles on the subject. Dr. Zagal  
24 will explain that video game companies like Take-Two often  
25 license in big bundles of intellectual property for

1 specific reasons. One reason, is that there's a built-in  
2 fan base that will purchase games involving their favorite  
3 franchises or fictional universes such as NBA video games,  
4 Star Wars video games, and even WWE-themed video games.

5 These fans demand authenticity and realism, which  
6 often means staying true to the source material. You don't  
7 want Batman showing up in Middle Earth, for example. And  
8 as sports video games go, like the WWE games, you need to  
9 be hyper-realistic.

10 For the WWE games, this means the over-the-top  
11 drama, the spectacle, and your favorite superstars must  
12 appear as they appear on TV and in real life. Authenticity  
13 drives sales. And a lack of authenticity can drown a video  
14 game franchise with negative reviews and criticisms. The  
15 fans care, and video game industries take notice and work  
16 very hard to achieve authenticity.

17 Dr. Zagal will tell you about the centrality of  
18 authenticity and realism to these video games, and about  
19 the importance of Mr. Orton's character in these video  
20 games in particular.

21 The Orton character is no throwaway character.  
22 He's very popular and can drive sales all by himself. And  
23 his tattoos are an important part of his character. If  
24 they were absent or not copied precisely, the video game  
25 public would know and would be critical. In short, it

1 would hurt sales and hurt value. Dr. Zagal will explain  
2 that in this case, the defendants copied Miss Alexander's  
3 artwork in order to make the Orton character more realistic  
4 because that's what fans demand, and to drive sales and  
5 value.

6 Dr. Zagal will tell you that some portion of the  
7 defendants' profits are attributable to the artwork copied  
8 into the video games.

9 We also hired Mr. Ryan Clark, an accomplished  
10 accountant and financial professional experienced in  
11 valuing companies' assets and intellectual property. We  
12 will prove to you and show you what the gross revenues are  
13 for these games, and that number is 418 million dollars for  
14 Take-Two, and over 50 million dollars for the WWE.

15 Take-Two, when they have an opportunity to present  
16 evidence, may try to prove to you what their deductible  
17 expenses are, and to prove to you what aspects of the  
18 defendants' profits are not attributable to the copyrighted  
19 works.

20 Mr. Clark, the accountant and financial  
21 professional we hired, has looked at the spreadsheets that  
22 Take-Two created for this litigation, showing the millions  
23 of copies sold and the hundreds of millions of dollars in  
24 revenue. And Mr. Clark had questions about these numbers  
25 and the expenses. The questions that Mr. Clark has had has

1 still not been answered to this day.

2 THE COURT: Mr. Friedman, we need a sidebar.

3 MR. FRIEDMAN: I'm sorry?

4 THE COURT: We need a sidebar.

5 (Proceedings continued at the bench.)

6 THE COURT: Mr. Friedman?

7 MR. FRIEDMAN: Yes, Your Honor.

8 THE COURT: You do know it's not proper to discuss  
9 with the jury what happened during the course of discovery,  
10 which may have led to different rulings in this case. That  
11 is totally not proper. That's not something that will come  
12 before this jury.

13 I have asked you, again, to stick to previewing and  
14 summarizing the evidence that the jury may hear in this  
15 case for their decision making. And I know it's tough for  
16 lawyers not to argue, but I'm intent that lawyers on either  
17 side of this case are not going to argue this case.

18 MR. FRIEDMAN: That's inaccurate. Mr. Clark's  
19 information is, he doesn't have enough information to make  
20 a conclusion, that he has questions about it, and was  
21 unable to get answers for it. That's his testimony.

22 THE COURT: At some point in time, are you going to  
23 let them hear their testimony?

24 MR. FRIEDMAN: When Mr. Clark testifies.

25 THE COURT: Okay. So, why are we going through it

1 now? That's not a preview.

2 MR. FRIEDMAN: I appreciate it. I'll move on.

3 MS. CENDALI: Your Honor? Is it proper to have a  
4 curative instruction for any of this?

5 THE COURT: No.

6 (Proceedings continued in open court, jury  
7 present.)

8 MR. FRIEDMAN: Mr. Clark will tell you what the  
9 gross revenues are for the video games at issue, and he  
10 will explain to you his opinions about the deductible  
11 expenses and other aspects of this case.

12 You will also hear from representatives of the  
13 defendant companies during the plaintiff's case. You will  
14 hear from Mr. Snyder, a corporate representative from  
15 Take-Two, about some of the same revenue numbers and other  
16 numbers from Take-Two's perspective.

17 You will also hear from Mr. Little, another  
18 corporate representative from Take-Two, who will tell you  
19 more about the copying of the video games and some of the  
20 other licensing activities that Take-Two engages in.

21 You will also hear from a representative of the  
22 WWE, Mr. Kiang, who will tell you how much Miss Alexander's  
23 art really means to the defendants.

24 They're not just copied into the game for  
25 background or atmosphere. If these tattoos were not copied

1 precisely, the WWE would not have given its approval and no  
2 games could have been sold at all. Without Miss  
3 Alexander's art, there would be no 2K16, 17, or 18, and the  
4 defendants could not have made the revenues that they did.  
5 That's how important the realism is in these video games,  
6 and that's how important Miss Alexander's art was to the  
7 value of these video games.

8 Ladies and gentlemen, this case is about a career  
9 tattoo artist asserting her copyrights against the  
10 defendants. It's about whether these companies can take  
11 what they want from small artists without doing the right  
12 thing. And we will prove to you that the defendants copied  
13 Miss Alexander's art in their entirety into the video  
14 games. And we will prove to you that they did it because  
15 they wanted to drive sales and increase values of their  
16 games. They did it without a license from Miss Alexander,  
17 and Miss Alexander never waived her copyrights.

18 The evidence and testimony will also show that the  
19 use of Miss Alexander's art by the defendants was for  
20 commercial purposes and as far as you can get from fair  
21 use, because they copied her art 100 percent. Copied it  
22 precisely. The defendants' use was not fair use, not to  
23 Miss Alexander, and not to the artists whose labors make  
24 the world more interesting and beautiful.

25 Artists like Miss Alexander deserve acknowledgment

1 for the value that they add and they deserve compensation.

2 Thank you.

3 THE COURT: Miss Cendali.

4 MS. CENDALI: Thank you, Your Honor.

5 May I proceed, Your Honor?

6 THE COURT: You may proceed.

7 MS. CENDALI: Thank you.

8 Good afternoon, ladies and gentlemen of the jury.

9 I'm Dale Cendali, and it's my honor and privilege to  
10 represent the Take-Two defendants in this case. I'll refer  
11 to them together as Take-Two.

12 I'm also honored to introduce you to Alfie Brody,  
13 standing right there. You'll hear him testify. And as he  
14 is going to tell you, he's the head of Global Marketing at  
15 the company. And as he is going to tell you, Take-Two has  
16 long made such great games as Grand Theft Auto, Red Dead  
17 Redemption, Bioshock, Words with Friends, and many more.

18 Right after I speak, you are going to hear from my  
19 co-counsel Curt Krasik, who represents WWE.

20 So, what is this case about? The evidence will  
21 show, this is a case about Take-Two's artistic expression  
22 and Randy Orton's personal freedom to show his own body.  
23 The evidence will show Randy Orton had the right and gave  
24 permission to show his body, including his tattoos, to WWE  
25 and Take-Two.



1           So, now, let's first talk about Take-Two's artistic  
2 expression. There are three video games at issue in this  
3 case, they are called WWE 2K16, 17, and 18, and I'll refer  
4 to them as the WWE 2K games.

5           None, as you can see, have Randy Orton on the  
6 cover. Mr. Orton is just one of over 100 wrestlers that  
7 fans can choose from in each game.

8           As you will see, the games are gigantic artistic  
9 works. I'd like to show you a couple of short clips of  
10 actual gameplay. And I'm going to show them to you with  
11 sound because sound is part of the experience. This is a  
12 clip of the Royal Rumble match in WWE 2K18.

13           (Video playing.)

14           Now, I'd like to show you another clip from that  
15 same Rumble after Mr. Orton enters the fray. Here it is.

16           (Video playing.)

17           Members of the jury, what you just saw was the  
18 result of hundreds of people working in game development  
19 and marketing to produce as realistic a depiction of WWE as  
20 could be. And you'll hear, they had the right to make that  
21 game realistic because this includes countless details like  
22 realistic arenas, wrestling rings, crowds, crowd noises,  
23 commentators, clothing, wrestlers who look like themselves  
24 in real life, and much more.

25           what you saw was only a teeny sliver of what this

1 game has to offer. And you'll see more of the games during  
2 this trial. You'll see that there's multiple arenas  
3 players, users, fans can choose from; different play modes;  
4 different ways the wrestlers can wrestle; you can pit  
5 wrestlers against each other one-on-one or in bigger  
6 matches like you just saw. The object of the game is for  
7 players to try to win wrestling matches.

8 Now, during the trial, you are going to hear how  
9 Take-Two worked hard to make the games as realistic as if  
10 you were watching a wrestling match on television or at the  
11 arena itself at a WWE event, including by showing wrestlers  
12 accurately like they look in real life. This includes  
13 everything about the wrestlers' appearance: Their faces,  
14 their heights, their builds, their costumes, their  
15 haircuts, their facial hair and, yes, their tattoos.

16 As Mr. Brody will testify, when it comes to the  
17 wrestlers, it's not about the tattoos, it's about making  
18 the wrestlers look like themselves. If wrestlers choose to  
19 have tattoos in real life, then they'll be depicted in the  
20 game with tattoos. But if they don't -- like for a long  
21 time John Cena don't have tattoos in real life -- well,  
22 then they won't have tattoos in the game. It's up to the  
23 wrestlers. Take-Two just wants the game to be accurate and  
24 realistic.

25 The evidence will also show that the three games

1 that the subject are of this lawsuit were not the first WWE  
2 video games. They aren't even the first ones to have Mr.  
3 Orton with his tattoos. Take-Two only got a license from  
4 WWE to make WWE wrestling games in 2013. And it released  
5 WWE 2K14 -- which is not one of the games being sued on --  
6 in the fall of 2013, so, long after this phone call that  
7 you have heard about.

8 As you will hear from Ed Kiang, WWE's former Vice  
9 President of Interactive Media Licensing, prior to 2013,  
10 WWE licensed another company, a company called THQ, to make  
11 WWE wrestling games.

12 Mr. Orton has been shown, as you will see in the  
13 evidence, with his tattoos in video games since 2002, in  
14 the 2002 edition of the THQ series and every game after  
15 that. And these video games were also designed to  
16 realistically depict wrestling, including how the wrestlers  
17 look in real life.

18 This is a stillshot of Mr. Orton with his tattoos  
19 in the game released in '22 [sic];

20 Here he is in the game released in 2003;

21 Here he is in the 2004 release of the game;

22 Now we see him in the 2005 release of the game;

23 This is Mr. Orton in the 2006 edition of the game;

24 This slide shows him in the 2007 release of the  
25 game;

1           Now, we see him in the 2008 version of the game;  
2     and,

3           Now, we see him holding his championship belt, one  
4     of several, I believe, in the game released in 2009; and,

5           This slide shows Mr. Orton in the WWE wrestling  
6     game released in 2010.

7           All of these games show Mr. Orton with his real  
8     world, real life, realistic tattoos, including the ones Ms.  
9     Alexander inked on him.

10          As you will hear, Mr. Orton has tattoos on his body  
11     that other tattoo artists inked, too. They have not  
12     claimed that Mr. Orton needed their permission to be shown  
13     in a video game. Mr. Alexander [sic] inked the five  
14     tattoos at issue in this case between approximately 2003 --  
15     counsel says maybe 2002 -- to 2008.

16          And as we just saw, Mr. Orton appears with his  
17     tattoos in the years before, during, and after Ms.  
18     Alexander inked him.

19          You will hear that Mr. Orton continued to be shown  
20     in WWE games with his tattoos year after year, including  
21     after Take-Two began releasing WWE 2K games in the fall of  
22     2013. Ms. Alexander never complained about any of this,  
23     nor did any tattoo artist, for anyone in the game, for all  
24     the wrestlers in the Complaint, not a single tattoo artist.

25          THE COURT: Counsel?

1 MS. CENDALI: Yes?

2 THE COURT: I don't think there is any relevancy as  
3 to what any other wrestling -- that --

4 MS. CENDALI: I'll move --

5 THE COURT: I'm not going to let the plaintiff  
6 argue. I'm not going to let the defendants argue.

7 MS. CENDALI: Ms. Alexander continued to take no  
8 action, even as Take-Two released game after game, year  
9 after year. The games in issue were released in October of  
10 '15, '16, and '17, as this slide shows.

11 Mr. Thomas, can you help me get the slide before  
12 that up?

13 (Off the record.)

14 MS. CENDALI: As this slide shows, the games in  
15 issue were released in October of 2015, '16, and '17, and  
16 as the slide shows -- and she did not make any complaint or  
17 file a lawsuit.

18 Ms. Alexander waited until March of 2018 to file a  
19 registration for copyrights on Mr. Orton's tattoos, more  
20 than ten years after inking him. And then she filed this  
21 lawsuit right afterwards, in April of 2018.

22 She never gave Mr. Orton, the WWE, or Take-Two any  
23 prior notice that she was going to file this lawsuit or  
24 file for copyright registrations.

25 You heard Mr. Friedman talk about, *well, video*

1 *games are different from being on television*, or something  
2 to that effect. Well, the evidence will show, whether Mr.  
3 Orton is appearing on television or in video games, he is  
4 still being shown realistically as he looks in real life.  
5 Someone on television isn't really in your living room.  
6 Both are digital representations of what the person looks  
7 like.

8           So, now I'm going to talk about Mr. Orton's  
9 personal freedom to show his body. You heard counsel for  
10 plaintiff say that defendants violated her rights by  
11 depicting Randy Orton in the WWE 2K games with his tattoos  
12 without her permission. You are going to hear the  
13 testimony of various witnesses, including professional  
14 wrestler Randy Orton himself.

15           Mr. Orton, himself, gave WWE and Take-Two  
16 permission to use his likeness, what he actually looks  
17 like, tattoos and all, in the WWE 2K games. And the  
18 evidence will show, he had the right to do so.

19           You will hear Mr. Orton testify that he asked for  
20 the tattoos at issue to be inked on his body; that he  
21 approved the tattoos before they were inked; and, he paid  
22 Ms. Alexander for those tattoos.

23           The evidence will show that Ms. Alexander never  
24 said one word to him about needing to come back to her for  
25 permission or to pay her more money before he could show

1 his body realistically in media of any kind with his  
2 tattoos.

3 she knew he was a professional wrestler who would  
4 show his body and would show his tattoos. That was the  
5 purpose of the whole thing.

6 Mr. Orton paid Ms. Alexander for her services and  
7 left that tattoo parlor thinking he could show his body as  
8 he wished, no strings attached.

9 And you will hear that this was not limited to just  
10 Ms. Alexander's experience with Mr. Orton. Ms. Alexander  
11 never told any clients in her entire career that they  
12 needed to get back to her for permission to show their  
13 bodies with their tattoos.

14 You will also hear Ms. Alexander has never licensed  
15 any of her tattoos that she inked on Mr. Orton to anyone.  
16 In fact, she's never licensed any tattoo that she's ever  
17 inked on anyone to anyone.

18 She has never licensed any tattoos to anyone in the  
19 video game industry, a super creative industry.

20 As you will hear, when people get tattoos,  
21 including Mr. Orton and Ms. Alexander themselves, they  
22 remove them, they cover them up, they alter them as they  
23 wish, without needing the permission of the tattoo artist  
24 who inked them originally. The tattoos are a permanent  
25 part of a person's body. People control their own bodies.

1           Now, I have mentioned the witnesses as to the facts  
2 who are going to testify, but you are also going to hear  
3 testimony from certain experts. And I'm going to ask each  
4 of them to stand when I mention their names.

5           You will meet Dr. Nina Jablonski, a professor at  
6 Penn State, who is going to talk about tattoos.

7           WITNESS JABLONSKI: (Nonverbal response.)

8           MS. CENDALI: Dr. Ian Bogost, a professor at  
9 Washington University in St. Louis -- known really as Wash  
10 U -- who is going to talk about the video games.

11          WITNESS BOGOST: (Nonverbal response.)

12          MS. CENDALI: Dr. Deborah Jay, a survey specialist  
13 who studied why people bought the WWE 2K games.

14          WITNESS JAY: (Nonverbal response.)

15          MS. CENDALI: And Mr. Malackowski, an economist,  
16 who will discuss whether there is a market for licensing  
17 real life tattoos in video games and plaintiff's claim for  
18 damages.

19          WITNESS MALACKOWSKI: (Nonverbal response.)

20          MS. CENDALI: Members of the jury, after you hear  
21 from all the witnesses, we believe the evidence will show  
22 five bedrock facts:

23                 1. The five tattoos at issue are a teeny part of a  
24 gigantic game;

25                 2. Mr. Orton hired Ms. Alexander to ink the



1 tattoos he directed;

2 3. Ms. Alexander was paid for the tattoos;

3 4. Ms. Alexander never told Mr. Orton that he  
4 needed to get her permission to be shown with his tattoos  
5 in the future, and until now, never acted otherwise; and,

6 5. Mr. Orton and WWE granted a license to Take-Two  
7 to depict Mr. Orton's likeness in WWE 2K.

8 Members of the jury, when you have heard all the  
9 evidence, listened to all the witnesses, looked at all the  
10 exhibits, we will ask you to find in favor of defendants  
11 Take-Two and WWE.

12 With the Court's permission, I'll cede the floor or  
13 podium to Mr. Krasik.

14 MR. KRASIK: Good afternoon, ladies and gentlemen.

15 I'm grateful for my first opportunity to talk to  
16 you guys directly today. My name is Curt Krasik and it's  
17 my privilege to represent WWE in this case.

18 You met him earlier briefly, but I'd like to  
19 acknowledge the gentleman from WWE, Mr. Matthew Geyer.  
20 Would you please stand for a second?

21 MR. GEYER: (Complies.)

22 MR. KRASIK: Matthew is the Senior Vice President  
23 of Gaming for WWE. So, in that position, he runs the  
24 department that is responsible for all WWE's video games  
25 and he manages the relationship with Take-Two.

1           Thank you for being here, Matthew.

2           I want to talk to you guys about that guy you kept  
3           hearing about in the opening statements of Mr. Friedman and  
4           Miss Cendali. WWE Superstar Randy Orton. I suspect some  
5           of you may know of him already.

6           Randy has been a WWE Superstar for over 20 years,  
7           and he also grew up in St. Louis, went to Hazelwood Central  
8           High School and still lives in the area with his family.

9           Randy is not a defendant in this case, but he is  
10          deeply invested in the outcome. Randy is voluntarily  
11          coming to court to testify to you in this case.

12          As you heard from Mr. Friedman, Ms. Alexander is  
13          claiming that Randy needed her permission to appear in the  
14          WWE 2K video games as he looks in real life with his  
15          tattoos. To Randy, that means that Ms. Alexander's  
16          essentially claiming that when she inked Randy's tattoos,  
17          she got control over his body --

18          THE COURT: Mr. Krasik? Do I need to talk to you  
19          about argument, too?

20          MR. KRASIK: Thank you, Your Honor.

21          THE COURT: All right.

22          MR. KRASIK: Randy will tell you that he believes  
23          he controls his own body, and he has volunteered to come to  
24          court to testify to you that Ms. Alexander's claims in this  
25          case are wrong.

1 Randy will tell you that he is really into tattoos.  
2 He likes the way they make him -- his body look when he's  
3 performing before thousands of fans in arenas or on  
4 television. And he likes them as a form of self-expression  
5 that reflects how he wants to present himself to the world.  
6 Randy has other tattoos on his body besides the ones inked  
7 by Ms. Alexander, and he will tell you that no other tattoo  
8 artist has ever claimed he needs their permission to be  
9 shown as he appears in real life with his tattoos.

10 Randy will tell you that his tattoos are part of  
11 his body, and he never needs to go back to a tattoo artist  
12 to get permission for what he can do with his own body.

13 As you are listening to all the evidence in this  
14 case, I want you to focus on one thing that you are not  
15 going to hear: Ms. Alexander never told Randy, when she  
16 was inking any of his five tattoos, that there were  
17 restrictions on what Randy could do with his body once she  
18 inked the tattoos. Not before she started, not during the  
19 hours and hours they spent inking the tattoos, and not  
20 after she was finished.

21 You are not going to hear anything different in Ms.  
22 Alexander's testimony. And you are not going to hear  
23 anything different from Ms. Alexander's counsel, because it  
24 just never happened.

25 Randy will tell you that if Ms. Alexander had said

1 anything to him about restrictions on what he could do with  
2 his body or needing permission to be shown with his  
3 tattoos, he would have just walked. Gone to a different  
4 tattoo artist. Randy will tell you he would never agree to  
5 give Ms. Alexander control over his body for the rest of  
6 his life. He wasn't asked to, and he didn't.

7 As a WWE Superstar, Randy is a professional  
8 entertainer who appears on national television, in  
9 advertisements, on WWE's website and social media  
10 platforms, at live WWE events around the country, and on  
11 WWE merchandise like T-shirts, posters and, yes, video  
12 games.

13 So, how Randy chooses to present himself to the  
14 public, including his tattoos, is crucial to his  
15 livelihood. Randy will tell you that he must be free to  
16 promote and market himself as he sees fit. His likeness --  
17 likeness is a term you are going to hear a lot during this  
18 case. I believe you heard it during Mr. Friedman's  
19 opening, as well -- and it's a legal-sounding word, but  
20 really all it means is what Randy looks like. Everything  
21 on his body from his facial features to his hair to his  
22 muscle structure, to his tattoos. And, naturally, Randy's  
23 likeness changed over time. But whatever Randy's body  
24 looked like was his likeness.

25 Randy will tell you that, as a professional

1       entertainer, he has the right to control how his likeness  
2       is used and be paid for the use of his likeness, just like  
3       any other celebrities or social media influencers with  
4       which you may be familiar.

5               Randy has chosen to grant the rights to his  
6       likeness to WWE and to WWE's business partners like  
7       Take-Two. Randy will tell you that he's been doing this  
8       for over 20 years, and this lawsuit is the first time that  
9       anyone, including Ms. Alexander, has suggested that Randy  
10      cannot grant the rights to his own likeness without getting  
11      permission from a tattoo artist.

12             Now, let's talk more specifically about Randy's  
13      tattoos so you can better understand all of the  
14      opportunities that the evidence will show Ms. Alexander  
15      had, but failed, to tell Randy that for the rest of his  
16      life he supposedly needs her permission to be shown with  
17      his tattoos.

18             Randy already had a couple of tattoos before he met  
19      Ms. Alexander. One of those tattoos, the one on the right  
20      on your screen, was a back tattoo that was inked by a  
21      different tattoo artist at Goldenlands tattoos in St.  
22      Louis. Randy went back to Goldenlands sometime in 2002 or  
23      2003 and met Ms. Alexander, who was working there at the  
24      time.

25             Randy hired Ms. Alexander to ink tribal tattoos on

1 his forearms and upper arms in the same style as the back  
2 tattoo he already had. Randy also hired Ms. Alexander to  
3 alter his existing back tattoo by adding shading and  
4 extending it up his neck and across his shoulders.

5 It was Randy's idea for the forearm and upper arm  
6 tattoos to be in the same style of tribal tattoo as his  
7 existing back tattoo, and he directed Ms. Alexander where  
8 to ink the tattoos.

9 Following his instructions, Ms. Alexander then  
10 sketched the way the tattoos would look on his skin, and  
11 Randy approved them before Ms. Alexander inked the tattoos.

12 Later, Randy hired Ms. Alexander to ink tattoos on  
13 both arms, what are sometimes called sleeves. Randy was  
14 very particular about the tattoos that he wanted.

15 He wanted a rose tattoo on his left arm, which he  
16 wanted to be his only tattoo in color, with the name of his  
17 daughter Alanna and Alanna's birth date in Roman numerals.

18 Randy also wanted a dove on his left arm in soft  
19 tones with no true black.

20 And over both arms he wanted skulls, but in shades  
21 of soft gray and black, or gray scale, so they would look  
22 like a background and not compete with his tribal tattoos.

23 Just like with the tribal tattoos, Randy gave Ms.  
24 Alexander direction on what tattoos he wanted and where he  
25 wanted them to be inked. Ms. Alexander then sketched the

1 way the tattoos would look on his skin and Randy approved  
2 them, before Ms. Alexander inked the tattoos.

3 when she was done, Randy will tell you that he paid  
4 her in full for his work. And she certainly never told him  
5 that she expected additional payments in the future, if he  
6 appeared with his tattoos, whether in video games or  
7 anywhere else.

8 So, let's go back to our count of the opportunities  
9 that the evidence will show Ms. Alexander had to tell Randy  
10 that they had supposedly begun this lifelong relationship  
11 where he needed to get her permission to show his tattoos:

12 The tribal tattoos on Randy's arm is one;

13 The extension of the back tattoo is two;

14 The rose tattoo with the name and birth date of  
15 Randy's daughter is three;

16 The dove tattoo is four; and,

17 The skulls tattoos is five.

18 Five separate times that Ms. Alexander never said  
19 there were any restrictions on what Randy could do with his  
20 body, once she inked the tattoos. Five separate times that  
21 Ms. Alexander never said that Randy needed her permission  
22 to be shown with the tattoos.

23 Now, Randy estimates that he spent approximately  
24 100 hours with Ms. Alexander inking his tattoos. So, they  
25 had a lot of time to talk. Over that time, they talked

1 about how Randy was a professional wrestler for WWE, and he  
2 even signed an autographed photo for Ms. Alexander that she  
3 displayed in her workstation at the tattoo parlor.

4 From the very first session together, Ms. Alexander  
5 knew full well that Randy's tattoos would be visible in any  
6 media, promotional materials or merchandise that showed  
7 him. And she knew that he, in fact, was shown in all these  
8 media because she has acknowledged that there were people  
9 who came to her for tattoos because they said they heard  
10 that she inked Randy's tattoos.

11 But in the approximately 100 hours that Ms.  
12 Alexander and Randy spent together, Randy will tell you  
13 that Ms. Alexander never said she had any problem with  
14 Randy's tattoos being shown in all of the media in which he  
15 appeared; never said that Randy had any restrictions on  
16 what he could do with his body once she inked the tattoos;  
17 never said that Randy needed her permission to be shown  
18 with the tattoos.

19 As I have talked about, Ms. Alexander's claims in  
20 this lawsuit are inconsistent with what the evidence shows  
21 Ms. Alexander said -- or more accurately didn't say -- to  
22 Randy at the time the tattoos were being inked. But they  
23 also are inconsistent with what the evidence shows she did  
24 in the ten years after she stopped inking Randy's tattoos,  
25 in 2008.



1           Before this lawsuit was filed out of the blue, as  
2           you have heard, in 2018, Ms. Alexander never complained  
3           about Randy appearing in any media with his tattoos. As  
4           Ms. Cendali told you, tattoos have been appearing in WWE  
5           video games since the early 2000s when a different company,  
6           called THQ -- not Take-Two, T-H-Q -- made video games  
7           before Take-Two.

8           And we are going to show you that Randy appeared in  
9           these WWE video games with his tattoos throughout this time  
10          that Ms. Alexander was inking Randy's tattoos. We'll show  
11          you an example today.

12          (Video playing.)

13          You can see in Smack Down versus Raw, in 2006, the  
14          game on the left, and Smack Down versus Raw 2011, the game  
15          on the right, both made by THQ, Randy was shown with the  
16          tattoos that Ms. Alexander had inked at the time those  
17          video games were released.

18          In Smack Down versus Raw 2006, the one on the left,  
19          you can see the tribal tattoos that Ms. Alexander inked.  
20          And in Smack Down versus Raw 2011, the game on the right,  
21          you can see the tribal tattoos. But now you can also see  
22          the sleeves of skulls tattoos and the rose tattoo.

23          After Ms. Alexander finished inking tattoos on  
24          Randy in 2008, we will show you that Randy continued to be  
25          shown in the WWE video games every year for the next ten

1 years, while Ms. Alexander did nothing.

2 Randy will also tell you that he had a different  
3 tattoo artist alter all of the tattoos that Ms. Alexander  
4 inked, except for the rose.

5 As you can see from a side-by-side comparison, the  
6 lines of the tattoos were reinked and darkened. But also,  
7 the faces and expressions of the skulls Ms. Alexander inked  
8 were changed. For example, in the highlighted skull's eye,  
9 the new -- the altered skull's eye was filled in and the  
10 shape of the eye was changed.

11 In this highlighted example of the skull, the  
12 original skull's eye was covered over, but now it's not,  
13 and the shape of the skull are completely different.

14 Despite these changes to Randy's tattoos, the same  
15 tattoos that are at issue that she is suing on in this  
16 lawsuit, Ms. Alexander again did nothing.

17 Ms. Alexander, in fact, has never claimed that  
18 Randy didn't have the right to alter the tattoos that she  
19 inked. As far as Randy was concerned, he could alter his  
20 tattoos just like he could grant the rights to show his  
21 tattoos, because they were his tattoos and his body.

22 As you were listening to all of the evidence about  
23 what Ms. Alexander has not done over the last ten years,  
24 remember to focus on the undisputed fact that five times  
25 Ms. Alexander inked tattoos on Randy, and all five times

1 she never said there were any restrictions on what Randy  
2 could do with his body once she inked the tattoos. She  
3 never said Randy needed her permission to be shown with the  
4 tattoos. But now she is asking you to award her money  
5 simply because Randy was shown in video games as he looks  
6 in real life --

7 THE COURT: Counsel?

8 MR. KRASIK: -- with his tattoos. I'm sorry, I was  
9 just --

10 THE COURT: You will have an opportunity to argue  
11 your case at the end of the case.

12 MR. KRASIK: Thank you, Your Honor. I'm wrapping  
13 up right now.

14 THE COURT: Thank you.

15 MR. KRASIK: Ms. Alexander's wrong in the claim she  
16 is making in this case. And at the end of the case, we  
17 will urge you to say no to what she is asking in this case,  
18 and return a verdict for the defendants.

19 Thank you.

20 THE COURT: Ladies and gentlemen, we are now about  
21 to begin the actual evidence in the case, and we'll start  
22 with -- I want to give you and read to you certain  
23 stipulations that the parties have arrived at. In other  
24 words, there are certain facts in this case that have been  
25 stipulated to by the parties. In other words, they are not

1       disputed. You don't need to remember them. You don't need  
2       to write them down. You will get them again at the end of  
3       the case. But I just want to give them to you now for  
4       context, as you hear the evidence coming in.

5               So, the following facts are stipulated to by the  
6       parties, in other words, they are not disputed:

7               World Wrestling Entertainment or "WWE" is an  
8       entertainment company that creates and promotes  
9       entertainment related to professional wrestling.

10              Randy Orton has been a professional wrestler for  
11     the WWE.

12              Catherine Alexander has been a tattooist.

13              Miss Alexander inked five tattoos on Randy Orton.

14              Catherine Alexander and Randy Orton did not discuss  
15     whether he had her permission to allow others to use the  
16     tattoos that Alexander inked on him in a video game.

17              Take-Two Interactive publishes and markets video  
18     games.

19              2K Games develops and publishes video games.

20              2K Sports develops video games.

21              Visual Concepts develops video games.

22              WWE 2K16 was released on or around October 27,  
23     2015;

24              WWE 2K17 was released on or around October 11,  
25     2016;

1           WWE 2K18 was released on or around October 17,  
2   2017;

3           Alexander filed this copyright infringement lawsuit  
4   on April 17, 2018.

5           With that, Mr. Simon, is the plaintiff ready to  
6   call her first witness?

7           MR. SIMON: Yes, Your Honor. We call Dr. Zagal.

8           THE COURT: Okay. Dr. Zagal, could you please step  
9   forward to be sworn.

10          (Witness sworn by courtroom deputy.)

11          THE WITNESS: My name is Jose Zagal. Last name,  
12   Z-A-G-A-L.

13          THE COURT: Mr. Friedman, I believe you are able to  
14   turn that podium.

15          MR. FRIEDMAN: If I may be able to approach and  
16   hand this to the witness?

17          THE COURT: Yes.

18          MR. FRIEDMAN: May I proceed?

19          THE COURT: You may.

20                               \* \* \* \* \*

21                               JOSE ZAGAL,  
22   having been first duly sworn, was examined and testified as  
23   follows:

24                               DIRECT EXAMINATION

25   BY MR. FRIEDMAN:

1 Q. Good afternoon.

2 A. Good afternoon.

3 Q. Please state your name and introduce yourself to  
4 the jury.

5 A. Hi. Good afternoon. My name is Jose Zagal.

6 Q. And, Dr. Zagal, what is your occupation?

7 A. I am a professor at the University of Utah's  
8 Entertainment Arts and Engineering program. We are  
9 colloquially known as the Games Program on campus.

10 Q. I'm sorry, could you say that again? You are  
11 colloquially known as what?

12 A. The Games Program. Entertainment Arts and  
13 Engineering is a bit of a mouthful.

14 Q. Thank you. Dr. Zagal, you are a professor, is that  
15 what you said?

16 A. Yes.

17 Q. All right. Where do you teach?

18 A. At the University of Utah.

19 Q. Thank you. And what do you teach?

20 A. I teach a variety of classes. They're all related  
21 to games and video games. This includes game design, video  
22 game ethics. I also often teach some of our -- what we  
23 call our projects classes, where students collaboratively  
24 develop games in teams.

25 I also teach some critical game design seminars, as

1 well. That's a new one this semester, I'm pretty excited  
2 about.

3 Q. Dr. Zagal, how long have you been teaching courses  
4 on video game design, video game development, and the like?

5 A. For over 20 years, at this point. I first taught a  
6 video game class in the year 2000. I was freshly graduated  
7 from my master's program and I was hired as a professor at  
8 a university in Chile. And in my first semester there, I  
9 developed a new class, a video game class. I then taught  
10 it in three successive years, of 2000, 2001, and 2002.

11 As a bit of trivia, as a part of that class, a  
12 significant number of the students in that class went on to  
13 found companies in Chile, video game companies. And so, I  
14 like to say that I have had an indirect hand in helping  
15 create the Chilean video game industry.

16 Q. Thank you. Dr. Zagal, you have a binder of  
17 documents in front of you. Could you turn to Exhibit No.  
18 37, please.

19 A. 37, yes. (Pause.) There we go. Sorry it took me  
20 a bit.

21 Q. Do you recognize what has been previously marked as  
22 Plaintiff's Exhibit No. 37?

23 A. Yes, I do.

24 Q. And what is Exhibit 37?

25 A. It is a copy of my CV dated as of March 2018, which

1 is when I first became involved in this case.

2 Q. Thank you, Dr. Zagal.

3 MR. FRIEDMAN: Your Honor, I'd move for admission  
4 of Plaintiff's Trial Exhibit No. 37, Dr. Zagal's CV?

5 THE COURT: Any objections?

6 MR. SIMMONS: Your Honor, we don't object to this  
7 as a demonstrative --

8 THE COURT: You need to get to a microphone.

9 MR. SIMMONS: We do not object to its use as a  
10 demonstrative, but we do object to its use as an  
11 evidentiary exhibit as it is not evidence in the case.

12 THE COURT: It's not evidence in this case?

13 MR. SIMMONS: Yes, Your Honor. It's his --

14 THE COURT: It will be if it's admitted.

15 MR. SIMMONS: Yes, Your Honor.

16 THE COURT: And what is the objection to the  
17 admission of an expert witness's curriculum vitae into  
18 evidence?

19 MR. SIMMONS: Yes, Your Honor. It's not evidence  
20 between the parties, Your Honor.

21 THE COURT: Overruled. Exhibit 37 is admitted.

22 MR. FRIEDMAN: Your Honor, permission to publish  
23 Exhibit 37.

24 THE COURT: You may.

25 MR. FRIEDMAN: Thank you.



1 Q. (BY MR. FRIEDMAN) Dr. Zagal, I believe you can see  
2 on your screen -- and members of the jury can see on their  
3 screens -- a copy of Exhibit 37. Is this a copy of your  
4 CV, or resume, as most of us might call it?

5 A. Yes, it is, the first page.

6 Q. All right. Dr. Zagal -- and Mr. Zidzik, our  
7 technologist over there, can assist in scrolling through.

8 I'd like to highlight a few portions of your CV for  
9 the jury. Could you take us -- or explain to the jury your  
10 educational background? I know you mentioned Chile. Maybe  
11 you can explain that in context of your educational  
12 background?

13 A. Yes. So, I did my undergraduate work and my  
14 Master's Degree in Chile, which is where I am from  
15 originally. I then moved to United States for my Ph.D.  
16 So, my background in Chile, I have a Bachelor in  
17 Engineering Sciences. I am also a civil industrial  
18 engineer with a computer science diploma. The  
19 undergraduate degrees are a bit different in Chile. This  
20 is a six-year undergraduate degree. That's why it has  
21 these two things kind of mushed together. That's also  
22 where I got my Master's in Engineering Sciences.

23 My Ph.D came later. I got that at -- here in the  
24 United States at the Georgia Institute of Technology --  
25 that's also known as Georgia Tech -- as a Ph.D in Computer

1 Science.

2 Q. Thank you, Dr. Zagal.

3 Dr. Zagal, have you worked as a researcher as well,  
4 in addition to your teaching responsibilities?

5 A. Yes. As part of my regular job duties, I do  
6 research, academic research. So, publishing articles,  
7 writing books, writing book chapters, giving presentations,  
8 and so on.

9 Q. In what areas do you or have you focused your  
10 scholarly research?

11 A. In a variety of areas. I'd say primarily in video  
12 game ethics, in game design, related topics to game design.  
13 I have also focused on specific kinds of video games like  
14 role playing games. I have also published a lot in games  
15 education, sort of examining how to better support students  
16 who want to learn how to make video games and how to learn  
17 about video games.

18 Q. Dr. Zagal, has your scholarly research or your  
19 teaching experiences or your background in the video game  
20 community, has it related any way to the marketing and  
21 sales of video games?

22 A. Yes. So, as part of my job, even though I have not  
23 published explicitly on marketing for video games, it is  
24 very important for me to understand how the industry works,  
25 what the trends are over the years, how they have been

1 changing. It's an important part of my job as an educator.  
2 I have most of my students want to become video game  
3 professionals, and helping them through their education so  
4 that they can have successful careers is really important.

5 And the video game industry moves very fast, it's  
6 very competitive, so things are changing all the time. So,  
7 I need to stay up to date, know what the trends are, how  
8 things have changed, what opportunities are coming down the  
9 line as it were.

10 I maintain a lot of contact with games industry  
11 professionals. I attend games industry events to stay up  
12 on what's happening, sort of not quite behind the scenes,  
13 but almost. So, in that sense I am very much attuned to  
14 what's going on in video game culture and also the  
15 industry.

16 Q. Dr. Zagal, throughout your career thus far, are  
17 there certain times when you have been recognized by your  
18 peers or by industry with any teaching awards or similar?

19 A. Yes. So, I am quite often honored within the  
20 University of Utah's College of Engineering as one of their  
21 top instructors, top teachers, as it were. Also, within  
22 the professional space, I have received recognitions from  
23 the Digital Games Research Association and also from the  
24 Higher Education Video Game Alliance. I was named a  
25 Distinguished Scholar and also a Fellow, for each of these

1       respectively.

2       Q.       Dr. Zagal, do you participate in any editorial  
3       responsibilities or peer review responsibilities for  
4       journals or publications in your field?

5       A.       Yes. That is also a regular part of my job. I am  
6       often reviewing articles, examining Ph.D dissertations,  
7       looking at -- reviewing articles for both journals as well  
8       as conferences. I am also the Editor in Chief of the  
9       journal Transactions of the Digital Games Research  
10      Association, and have been for a few years now.

11      Q.       Have you been published on the topics that you have  
12      been discussing, video game design, video game development?

13      A.       Yes. Conference articles, presentations. I have a  
14      book that isn't in the CV because it came out afterwards, a  
15      book specifically dedicated to giving advice on game  
16      design, which I wrote together with a group of my students.  
17      It was a really exciting project for them to have a  
18      published book with some game design wisdom. Yes, I am  
19      very much active in that space.

20      Q.       And, Dr. Zagal, apart from sort of your academic  
21      career, have you designed video games yourself?

22      A.       Yes. I have done so professionally, very early in  
23      my career. At this point in time, it's mostly -- I am  
24      either designing games for research purposes or sometimes  
25      for my own intellectual curiosity and pursuit. But I do

1 try to stay active in making games as well as teaching  
2 about how to make them.

3 Q. As a professor of graduate students, does some of  
4 your faculty work include mentoring graduate students or  
5 higher-level students?

6 A. Yes, both -- our program has both -- we both have a  
7 graduate program with masters students as well as an  
8 undergraduate program.

9 Q. And in connection with that program, do you often  
10 -- or do you see your graduate students taking careers in  
11 the video game industry?

12 A. Yes. We have been very successful. Our program is  
13 highly ranked. And I think part of that ranking is because  
14 we get -- we are very successful in getting students --  
15 helping students achieve their dreams of getting jobs in  
16 the industry. So, I have a lot of alumnae working at games  
17 studios all over the world, working on from very famous big  
18 titles to much smaller sort of independent titles, as well.

19 Q. Do you take it as a point of pride when your  
20 students end up working on some of the biggest game titles  
21 in the country?

22 A. Yes, I do. In fact, a couple years ago they  
23 started sending me signed copies of the games they worked  
24 on. And so, I started putting them in my office window.  
25 And I have reached the point where I now had to take some

1 out to put -- to fit the new ones in. And the alumnae  
2 really enjoy it and we talk about it often. It's a really  
3 good opportunity for me to connect with them and hear what  
4 they're up to, what they have been doing. And that's also  
5 another way for me to kinda stay up to date with what's  
6 happening in the industry at different companies, and so  
7 on.

8 Q. Thank you, Dr. Zagal.

9 Dr. Zagal, did my law firm hire you to look at and  
10 study some of the copyright issues, technical issues, and  
11 other issues involved in this case?

12 A. Yes, I was hired to work on this case.

13 Q. All right. And you agreed to take a look at this  
14 case for us, didn't you?

15 A. I did.

16 Q. And what is it that we asked you to do?

17 A. To examine a variety of documents, to look at the  
18 games themselves, and to form my opinion on whether certain  
19 things had happened during -- or happened or not happened  
20 during this case.

21 Q. Thank you. You mentioned that my law firm provided  
22 you with a number of documents. Did we provide you with  
23 documents about the development of the 2K video games?

24 A. I was provided a lot of documents. I wasn't  
25 provided with specific technical details on the development

1 themselves. It was not really necessary for the kind of  
2 analysis I needed to do, though.

3 Q. We provided you documents from Take-Two and the WWE  
4 in this case; right?

5 A. Yes, that is correct.

6 Q. And did we provide you with copies of the video  
7 games?

8 A. Yes.

9 Q. And did you play those video games?

10 A. Yes.

11 Q. Okay. Did you play them enough that you learned  
12 your way around each of the video games, the 2K16, 17, and  
13 18 video games at issue in this suit?

14 A. I played them enough that I could form an opinion  
15 to write the report and to be here to testify in front of  
16 you today.

17 Q. Thank you.

18 Have you completed your review of all the materials  
19 we provided to you?

20 A. Mm-hmm. Yes.

21 Q. And are you prepared today to offer your opinions  
22 and explain those opinions to the jury?

23 A. Yes, I am prepared.

24 MR. FRIEDMAN: Your Honor, I submit that Dr. Zagal  
25 has met the qualifications as an expert witness. I'd like

1 to proceed with his opinion testimony.

2 MR. SIMMONS: No objection, Your Honor.

3 THE COURT: The record should note that he is  
4 qualified to provide expert testimony in the area as stated  
5 in this case.

6 You may proceed.

7 MR. FRIEDMAN: Thank you, Your Honor.

8 Q. (BY MR. FRIEDMAN) Dr. Zagal, I'd like to talk to  
9 you a little bit about the idea of licensed intellectual  
10 property in video games. Okay?

11 A. Okay.

12 Q. Now, from the perspective of a video game designer  
13 or developer, do video game companies sometimes obtain  
14 licenses to intellectual property to use in their video  
15 games?

16 A. I would say it happens very often, actually.

17 Q. And what are some examples of this, if you could  
18 explain that to the jury?

19 A. Yeah, so there's a variety of reasons and a variety  
20 of different things that might be licensed. So, for  
21 example, a video game company might license someone else's  
22 technology, especially if they think it will save them time  
23 or money in developing a video game.

24 A video game company might license certain content.  
25 Certain, for example, music. For example, you might want



1 to license some songs by a famous artist if you want it to  
2 appear in your video game.

3 You might license an entire universe, an entire  
4 property. You know, I might want to make Harry Potter  
5 video games, and so you would license the Harry Potter  
6 universe and all the characters and storylines and places,  
7 and so on and so forth.

8 Q. Do video game developers pay for these licenses?

9 A. Yes, they do.

10 Q. Now, there's a very basic question: why do video  
11 game developers pay for licensed intellectual property in  
12 the way that you are describing?

13 A. Because --

14 MR. SIMMONS: Objection, Your Honor. May we have a  
15 sidebar?

16 THE COURT: Yes.

17 (Proceedings continued at the bench.)

18 THE COURT: Go ahead, counsel.

19 MR. SIMMONS: Your Honor, the witness was asked to  
20 speak to all -- to video game companies in general. The  
21 report that he drafted does not speak to all video game  
22 companies. I'm concerned about the scope of his answer.  
23 It may go beyond the scope of his report.

24 THE COURT: Mr. Friedman?

25 MR. FRIEDMAN: In addition to Dr. Zagal's report,

1 Dr. Zagal was deposed by the defendants, all of them, for  
2 many hours. His opinions are broader than just one very  
3 specific company. He's here as an expert witness on the  
4 video game industry, he has opinions concerning what video  
5 companies do generally, and we will move on to specifics as  
6 well.

7 THE COURT: well, it may go beyond the scope of his  
8 report, but the specific questions or question as to why  
9 video game companies in general license certain things  
10 calls for rank speculation, even given this expert's  
11 background.

12 You can ask him for what his knowledge is based on  
13 his own experience, but perhaps it was your question. But  
14 as stated, the question to this expert asking him why a  
15 whole universe of individuals do something, the way that  
16 you phrased it, it does call for rank speculation and the  
17 objection is sustained.

18 You may rephrase the question.

19 MR. FRIEDMAN: Thank you, Your Honor.

20 (Proceedings continued in open court, jury  
21 present.)

22 THE COURT: You may proceed, Mr. Friedman.

23 MR. FRIEDMAN: Thank you, Your Honor.

24 Q. (BY MR. FRIEDMAN) Dr. Zagal, in your experience,  
25 why do video game developers pay for licensed intellectual

1 property?

2 MR. SIMMONS: Objection, Your Honor.

3 THE COURT: Sustained.

4 Q. (BY MR. FRIEDMAN) Dr. Zagal, you have experience  
5 in the video game industry; correct?

6 A. That is correct.

7 Q. Okay. And you mentioned previously that video game  
8 developers sometimes license intellectual property; is that  
9 right?

10 A. Yes.

11 Q. All right. Do you have an understanding why  
12 certain video game developers might license intellectual  
13 property?

14 A. Yes, I do.

15 Q. All right. What is that understanding based on?

16 A. It is based on the -- what I would call sort of a  
17 common sense understanding that, when you license  
18 something, you are doing it because it will allow you to  
19 make more money or to perhaps even make money in the first  
20 place. There's a couple reasons that I can give for that.

21 Q. What are the reasons?

22 A. So, for example, brand recognition is one of them.  
23 All right. So, if I'm making a video game -- let's say I'm  
24 making a wrestling video game. I might have to spend a lot  
25 of money marketing that video game and getting the word out

1       there that there is a new video game about wrestling. But  
2       if I could license someone else's intellectual property, a  
3       very famous wrestling universe, for example, I would be  
4       able to take advantage of the brand recognition that comes  
5       with that. Someone walking into the store or going to a  
6       digital store might say, *well, there's this generic*  
7       *wrestling game but there's this other one that has a brand*  
8       *that I know, that I've heard about.* And so, I'm more  
9       likely to buy that game if all other things are similar.

10             An additional reason is that there's an installed  
11       consumer base. There's already a fan base that will be  
12       interested in, or might be interested in playing, let's  
13       say, a video game that is using someone else's IP. The  
14       Harry Potter fans of the world would be interested  
15       potentially in playing a Harry Potter video game, as well.  
16       So, that's a good reason to do that, too.

17             You can save some money on marketing, but you are  
18       also getting access to a large consumer base, a fan base,  
19       which is already interested in the product that you are  
20       hoping to sell.

21       Q.       Thank you, Dr. Zagal.

22             Is the video game industry in your experience a  
23       competitive industry?

24       A.       Yes, it is a very competitive industry.

25       Q.       All right. Does licensing popular intellectual

1 property help a video game company be more competitive in  
2 that industry?

3 A. Yes, it can help with that. It can help you stand  
4 out. As I mentioned, maybe you're -- you have a generic  
5 sports game but now you have attached or licensed a famous  
6 league to that sports game. You can rely on certain  
7 celebrities, certain characters, certain songs and music  
8 that the consumers might be aware of, and thus make that  
9 product more enticing to them, more interesting, because it  
10 has something that's familiar or exciting for them to, to  
11 participate in, to play with.

12 Q. Does licensing intellectual property in a video  
13 game, in the way you are describing, make the video games  
14 more expensive to design or create?

15 A. Well, you are doing it to make more money in the  
16 long run, obviously, so there is a cost associated to  
17 licensing. You have to pay the license. But the idea is  
18 that you are going to make up that in increased sales,  
19 increased revenue, and increased value of that game.

20 The other thing to keep in mind also in the case of  
21 video games, pretty much all the content in the game needs  
22 to be created by the people making the game. So, if I'm  
23 going to make a video game about children going to magical  
24 school, it isn't necessarily any additional effort to make  
25 a video game where those children happen to be, let's say,

1 the characters from Harry Potter, for example. There isn't  
2 necessarily any additional work in that set. Or if there  
3 is, it can be a bit marginal.

4 So, you are basically doing it because you want to  
5 make more money. That's the business sense behind it.

6 Q. Do the WWE 2K Games --

7 THE COURT: Mr. Friedman? I'm sorry to interrupt  
8 you. Perhaps could you pull the microphone closer or down?

9 MR. FRIEDMAN: Sure.

10 THE COURT: Because I'm having problems hearing  
11 you.

12 MR. FRIEDMAN: Thank you.

13 Q. (BY MR. FRIEDMAN) Dr. Zagal, can you hear me okay?

14 A. Yeah.

15 Q. Dr. Zagal, do the WWE 2K games -- 16, 17, and 18,  
16 which I'll refer to as the WWE 2K games -- do those games  
17 use licensed intellectual property?

18 A. Yes, they do.

19 Q. Where? Where inside them?

20 A. They have a lot of music featuring sort of famous  
21 pop stars, and so on. And they're also using the WWE  
22 intellectual property, the wrestlers, their names, their  
23 personae's, all those kinds of things.

24 Q. Dr. Zagal, I'd like to talk to -- talk to you a  
25 little bit about the concepts of realism or authenticity in

1 video games. Is realism -- first of all, what is meant by  
2 realism and authenticity in a video game?

3 A. So, it can have several meanings. One meaning is  
4 realism to the real world. Right? So, if I'm making a  
5 game about flying an airplane around, and it's a realistic  
6 game that's meant to show how flying an airplane works in  
7 the real world, that would be sort of, *How like the real*  
8 *world is this? Does gravity work the way it is in the real*  
9 *world? Does wind, weather?* And so on, so forth.

10 In the video game culture, there's also this notion  
11 of realism in graphics. And over the years, as computers  
12 and video game consoles have gotten better, they are able  
13 to display graphics that look more like they -- like things  
14 do in the real world, so there's better quality in that  
15 sense. Maybe you have heard of resolution, for example.

16 So, there's that notion of graphics being more  
17 realistic, being more precise or with more colors, and  
18 with, you know, sort of deeper, richer textures, and so on.  
19 So, that's another notion that comes across. And I think  
20 we saw in the earlier videos a different -- the older video  
21 games that we saw looked worse, in the sense the graphics  
22 were less realistic.

23 There's a third notion which I think is important  
24 in this case which has to do with maintaining sort of  
25 truthness -- truthness with air quotes here -- to the

1 source material. Right? So, I have mentioned Harry Potter  
2 a couple of times. If I was making a video game about  
3 Harry Potter and there's magic, well, we know that magic,  
4 the way it appears in Harry Potter, doesn't appear -- it  
5 doesn't exist in the real world. But in that sense, my  
6 video game is authentic to the Harry Potter experience.  
7 And that's an important aspect to consider, as well.

8 Q. It sounds like you might be a Harry Potter fan.

9 A. I have kids.

10 Q. Dr. Zagal, are these ideas of realism and  
11 authenticity, are they considerations when developing a  
12 video game?

13 A. Absolutely. And I think we've heard that already  
14 from opposing counsel, basically saying how important  
15 realism is for them in the games, and it's something that I  
16 agree with. The wrestling sports games have to maintain --  
17 a WWE video game needs to be true to the WWE universe and  
18 experience.

19 Q. I believe you mentioned that realism -- one of the  
20 aspects of realism is staying true to the source material.  
21 Is -- would that be a consideration in a sports video game  
22 like the WWE 2K games?

23 A. Yes. So, here in this case we have these two  
24 factors coming together. One is the WWE wrestlers are  
25 wrestlers in real life; these are actual human beings that



1 perform in live events, and so on, and so you want them to  
2 look in the video game like they do in the real world. But  
3 there's also realism to the WWE experience. That has its  
4 own certain larger-than-life interests and excitement it  
5 has to do.

6 watching Olympic wrestling is not the same as  
7 watching WWE wrestling or random high school wrestling or  
8 other professional wrestling, as well. So, there's an  
9 additional layer there that means, *Is this reflective of*  
10 *the spirit? The notion? The excitement?* What WWE means  
11 in their experience and in their universe.

12 Q. Thank you, Dr. Zagal.

13 Are these concepts of realism and authenticity used  
14 to market the WWE 2K Games?

15 A. Yes, they are. They're an important part of the  
16 marketing efforts.

17 Q. Could you turn to Exhibit 46 in your trial binder  
18 there?

19 A. Okay.

20 Q. Are you ready, Dr. Zagal?

21 A. You said 47, correct?

22 Q. You are right. Thank you. Dr. Zagal, what is  
23 Exhibit 47?

24 A. I'm seeing a picture of a game disk --

25 Q. Mm-hmm.

1 A. -- of the Xbox One version of WWE 2K18.

2 Q. Dr. Zagal, would you turn to Exhibit 46? Do you  
3 have the cover of the game disk -- or -- I'm sorry -- the  
4 cover -- the box in which the game disk comes from?

5 MR. FRIEDMAN: Your Honor, permission to approach?

6 THE COURT: Are you asking him about those or in  
7 the binder?

8 MR. FRIEDMAN: These are reproduced in there. It  
9 might be much simpler if he could just look at these.

10 THE COURT: That's fine.

11 MR. FRIEDMAN: Thank you.

12 A. Thank you. Sorry about that.

13 Q. (BY MR. FRIEDMAN) That's okay. I think it was my  
14 fault.

15 Dr. Zagal, I have just handed you three plastic  
16 boxes. Are you familiar with those?

17 A. Yes, I am.

18 Q. Okay.

19 A. [Displaying items to the jury.]

20 THE COURT: No, sir.

21 THE WITNESS: Sorry.

22 MR. FRIEDMAN: Thank you, Your Honor.

23 Q. (BY MR. FRIEDMAN) Dr. Zagal, what are you holding?

24 A. These are Xbox One versions of three video games.

25 THE COURT: I'm sorry, counsel. For the record, we

1 need exhibit numbers.

2 MR. FRIEDMAN: Is this 42, 44 and 46?

3 MR. TAHAN: Yes.

4 MR. FRIEDMAN: Your Honor, I have handed Dr. Zagal  
5 what are marked as Plaintiff's Exhibits 42, 44, and 46.  
6 They are physical copies.

7 Q. (BY MR. FRIEDMAN) Dr. Zagal, are you familiar with  
8 Exhibits 42, 44, and 46?

9 A. Yes, I am.

10 Q. What are those exhibits?

11 A. These are physical copies of the Xbox One versions  
12 of three video games, WWE 2K16, 17, and 18.

13 Q. Thank you, Dr. Zagal.

14 Now, I was asking you whether the concepts of  
15 reality and authenticity are used to market the WWE 2K  
16 games. Do you remember that?

17 A. Yes.

18 Q. Okay. Do the -- I'm sorry.

19 MR. FRIEDMAN: Your Honor, permission to move for  
20 admission of Exhibits 42, 44, and 46, the physical copies  
21 of the video games for the Xbox platform?

22 THE COURT: Any objections?

23 MR. SIMMONS: No, Your Honor.

24 THE COURT: And for the record, Exhibit 42 is 2K16;  
25 Exhibit 44 is 2K17; and, Exhibit 46 is 2K18. Correct?

1 MR. FRIEDMAN: That's correct, Your Honor.

2 THE COURT: Then Exhibits 42, 44, and 46 are  
3 admitted.

4 MR. FRIEDMAN: Thank you, Your Honor.

5 Q. (BY THE COURT) Dr. Zagal, how is it that the WWE  
6 2K games market realism and authenticity?

7 A. Well, we can look at what it says on the back of  
8 the box. And I can give you a couple examples.

9 So, for WWE 2K18, the back of the box says -- and  
10 this is highlighted in red -- the most realistic -- sorry,  
11 a quote -- "most realistic WWE video game ever."

12 And then it continues, but now in white: "A new  
13 graphics engine delivers a visual overhaul and the most  
14 realistic WWE graphics to dates."

15 Q. Does similar marketing language appear on other  
16 video games?

17 A. Yes, there's similar language.

18 Q. Okay.

19 A. And reading here from WWE 2K17, again the back of  
20 the box in red text which is highlighted from the rest of  
21 it: "Immersive gameplay and more."

22 And underneath that, in white: "Experience the  
23 most authentic WWE gameplay ever."

24 And then it continues.

25 Q. Thank you, Dr. Zagal.

1           Clearly, realism is a very important consideration  
2     in the 2K video games; right?

3     A.       Yes.

4     Q.       Thank you.

5           Is realism or authenticity more important in some  
6     video game genres than others?

7     A.       Yes, I think that's a fair thing to say.

8     Q.       In particular, is realism and authenticity an  
9     important consideration in the sports game genre?

10    A.       Yes. Because they are featuring characters that  
11    are based on copies of sort of human, actual real life  
12    humans, there are additional considerations there for  
13    realism.

14           If I was making a video game about The Simpsons,  
15    The Simpsons don't look like real humans. I think we can  
16    all agree.

17    Q.       Dr. Zagal, do the tattoos that Miss Alexander inked  
18    on Mr. Orton, do their appearance in the WWE 2K games  
19    affect the perceived realism or authenticity of those video  
20    games?

21    A.       Yes. They're an important part of that. I think  
22    we have heard already how important it is that the  
23    characters that appear in the video game look like they're  
24    real life counterparts in the real world, and that includes  
25    of course their tattoos, when they have them.

1 Q. Dr. Zagal, have you studied the critical reception  
2 of the 2K video games?

3 A. Yes, I have examined that, as well.

4 Q. Okay. And have you looked into the critical  
5 reception and fan reception of the 2K series of games as  
6 they relate to their authenticity or realism?

7 A. Yes. So, I have looked at sort of the series as a  
8 whole, including also the titles in the case here.

9 what you find there is -- and this is not uncommon  
10 in video game culture -- is that it's one thing for the  
11 companies to say, *we want our games to be more realistic*,  
12 but we can also look and see what the fans are saying. Do  
13 they care? Maybe they don't care. Well, it turns out that  
14 they do care. And they are, I would say, pretty loud -- at  
15 least on the internet -- in terms of their opinions.

16 And so, they will complain about games that they  
17 feel are not up to the standards that they have. They  
18 complain about the way the characters look, when they feel  
19 they don't look the way they look in a real live event, for  
20 example. They'll complain when they feel that there is a  
21 decrease in quality of the graphics of the representations  
22 of the wrestlers in the video games, compared to previous  
23 years.

24 we find this basically -- there's lots of evidence  
25 online. They collect evidence. They're very much

1 interested in, *How do these characters look? Do they look*  
2 *better? Do they look good? Do they look great?*

3 They're excited by this or sometimes disappointed  
4 and very critical.

5 Q. Do such complaints by the fan base concerning the  
6 realism or authenticity of the 2K games affect the sales or  
7 the value of the video games themselves?

8 A. Yes. I think there's at least two ways in which  
9 this can have an effect. The first is that if the game is  
10 perceived poorly, because of its realism, because its  
11 graphics are not up to snuff, this leads to negative  
12 reviews, a lot of criticism online, and that can lead to  
13 decreased sales.

14 Basically, if your game has very bad scores online,  
15 both by professionals as well as by the fans, this can lead  
16 to reduced sales. So, that's on the negative side. Right?  
17 There are people that might choose now no longer to buy the  
18 game -- they wanted to -- because they heard this year was  
19 not a particularly good year for that title. And they'll  
20 wait until next year, perhaps.

21 There's also the perception of fans who are  
22 interested in -- who haven't perhaps bought the game  
23 before. And so, if I am doing my research, I want to  
24 figure out, *Should I buy this game or not? I'm going to*  
25 *read reviews. I'm going to go online. I'm going to see*

1     *what people said about the game.* If I'm finding a lot of  
2     negative reviews online for a particular video game, and I  
3     am reading them and they are complaining that the graphics  
4     don't look right, that the characters don't look  
5     appropriate the way I should expect them, and I'm a fan,  
6     for example, of WWE, I'd say, *well, I am not going to buy*  
7     *this game.* I'm going to -- I will not -- I may not be  
8     impressed. Right? So, people that haven't bought it  
9     before won't be impressed. So, I'd say you're going to  
10    lose those potential sales, as well.

11    Q.       Dr. Zagal, the video games that we have been  
12    discussing have many characters in them, as do many video  
13    games. Can the inclusion of a single character in a video  
14    game that has many characters in it affect the value of  
15    that game?

16    A.       Absolutely. You have to take into account the --  
17    at least two things. So, number one is the popularity of  
18    that character. I mentioned Harry Potter before, so I'll  
19    go back to Harry Potter. If I'm buying a Harry Potter book  
20    and it's Harry Potter Book No. 3, but Harry Potter the  
21    character is not there? Well, Harry Potter is kind of an  
22    important character. Right? He is -- might be very  
23    popular with a lot of fans behind Harry Potter.  
24    Additionally, the character might be important, too.

25               Voldemort, the character in Harry Potter, doesn't



1 appear a lot in any of the books. He appears in some of  
2 them. But he's still a very important character. He's a  
3 big villain. Drives a lot of the plot in the narrative.

4 And so, in the context of WWE, there are hundreds  
5 of wrestlers. And technically, I think there's a lot more  
6 than that because the WWE franchise has many years of  
7 existence. So, there's a lot of wrestlers who are retired,  
8 who have passed away, some of them, at this point.

9 So, how important are those wrestlers to the brand,  
10 to the franchise, and how many fans do they have, are two  
11 ways to think of how important a particular wrestler might  
12 be over another wrestler.

13 Q. Is the real life Mr. Randy Orton a popular wrestler  
14 in the WWE in his own right?

15 A. Yes, it is -- I believe he is very popular.  
16 There's a lot of reasons, and we have heard that already.  
17 We have heard him described as a Superstar. Not just a  
18 star, but a Superstar with a long and luscious career in  
19 the WWE. Not everyone is active for as long as he has been  
20 active. I believe we can -- in social media, when I  
21 started my research, he had almost six million followers on  
22 Twitter. I believe he had four and a half million  
23 followers on Instagram. That's a significant social media  
24 presence, especially when you compare it to some of the  
25 other -- some of the other sort of stars that the WWE has.

1       So, he's definitely up there as an important wrestler  
2       within their universe.

3       Q.       You say, especially when comparing the social media  
4       followers of other WWE stars. What are you referring to?

5       A.       So, at the time when I started doing my research,  
6       the WWE official Twitter account had -- I believe it was  
7       something around approximately 10 million followers. So,  
8       more than Randy Orton. And that makes sense, right? It's  
9       a much bigger franchise and brand.

10       But there are other wrestlers -- I believe the  
11       wrestler who is on the cover of WWE 2K18 had, I think,  
12       about less than half of what Mr. Orton had. Right? And so  
13       there's -- that's a measure of popularity, and I think it's  
14       important to consider it in that context.

15       Q.       So that's -- so, what you are discussing then is  
16       Mr. Orton's popularity in real life. What about within the  
17       2K universe of video games? Now referring to the Orton  
18       character. What of the Orton character and his popularity  
19       within the 2K universe?

20       A.       I think we heard already that he's popular enough  
21       that he's appeared in many video games already, many more  
22       titles in fact even than were shown. I believe at some  
23       point -- maybe this could have been about ten years ago --  
24       Mr. Orton in an interview mentioned that he didn't remember  
25       exactly how many video games he had been in, because it had

1       been so many. He's -- he's -- he's a regular member of  
2       these video games. He is often there. He is expected to  
3       be there by the fans.

4       Q.       Does the Orton character itself in the 2K series of  
5       video games have its own fan base that might be critical of  
6       his appearance or comment on his appearance in video games?

7       A.       Yes. So there are --

8               MR. SIMMONS: Objection, Your Honor.

9               THE COURT: Hold on.

10              MR. SIMMONS: Calls for hearsay.

11              THE COURT: Overruled. Counsel, I would ask that  
12       you lay a better foundation as to the basis for his  
13       knowledge.

14              MR. FRIEDMAN: Yes, Your Honor.

15       Q.       (BY MR. FRIEDMAN) Dr. Zagal, in connection with  
16       your research into this case, did you -- you have mentioned  
17       that you looked at the social media following of Mr. Orton  
18       in real life. And then, in addition, you did research as  
19       to the critical reception of the 2K video games, both the  
20       ones that are involved in this case as well as other ones  
21       that are not involved in this case; is that right?

22       A.       That is correct.

23       Q.       Okay. In connection with that research, did you  
24       also research and look into the critical reception of  
25       individual characters within the 2K video games, not Mr.

1 Orton in real life?

2 A. That is correct.

3 Q. Okay. Including the Orton character?

4 A. Yes.

5 Q. Okay. In connection with your research concerning  
6 the Orton character, did you find that the Orton character  
7 is a popular 2K video game character?

8 A. Yes. I found numerous examples of people  
9 interested in Randy Orton's appearance, like the character,  
10 the video game character. There's lots of YouTube videos  
11 where fans have sort of collected different snippets from  
12 the titles and put them all together in a sort of medley.  
13 "Here are all of Randy Orton's entrances." "Here are all  
14 of his finishing moves." Things of that sort. There are  
15 even videos made by fans who have tracked Orton's  
16 appearance in video games over the years in comparing how  
17 he has looked.

18 And in fact, I have also found evidence of Mr.  
19 Orton himself describing the interest he follows, in seeing  
20 how he appears in the video games as well, and how he's --

21 MR. SIMMONS: Your Honor?

22 THE COURT: Yes?

23 MR. SIMMONS: Could we have a sidebar, Your Honor?

24 THE COURT: Yes.

25 (Proceedings continued at the bench.)

1 MR. SIMMONS: Your Honor, you had granted a motion  
2 in limine concerning Randy Orton's statements about  
3 himself, and I believe the witness is testifying regarding  
4 those statements.

5 THE COURT: Mr. Friedman, that is correct.

6 MR. FRIEDMAN: Your Honor, now there is some  
7 additional context. If I am permitted to continue this  
8 examination, I am -- with that additional context.  
9 Otherwise, I can move on.

10 THE COURT: What do you mean, additional context?  
11 My ruling is my ruling. My ruling remains the same.

12 MR. FRIEDMAN: My apologies, Your Honor. I'll pull  
13 him back and move on.

14 THE COURT: Right. But this is Day One. We have a  
15 number of days left. So, let me make sure that we get this  
16 clear, Mr. Friedman. You may not knowingly violate my  
17 rulings on motions in limine. That was -- that was a clear  
18 ruling. It was specifically with respect to this  
19 testimony. And whether you think you can provide context  
20 or not, my ruling is my ruling, counsel.

21 MR. FRIEDMAN: Thank you, Your Honor.

22 THE COURT: All right.

23 (Proceedings continued in open court, jury  
24 present.)

25 THE COURT: Objection sustained.

1 Q. (BY MR. FRIEDMAN) Dr. Zagal, following in that  
2 same vein, does the degree of realism in the WWE 2K games  
3 have an effect, in your opinion, on the sales of the video  
4 games?

5 A. I believe it does.

6 Q. In what way?

7 A. In the sense that, as I mentioned earlier, when  
8 people find the realism is not up to standards or up to  
9 expectations, they will complain about the game, the  
10 reviews will come in, they'll post low reviews, and that  
11 will lead to depressed sales. I also believe that people  
12 intending to buy the game will then see these scores and  
13 then choose not to buy it.

14 Q. And in the context of the realism or perceived  
15 authenticity of the 2K games, do the appearance of Miss  
16 Alexander's tattoos have an effect on that?

17 A. Yes, they do.

18 Q. Okay. In what way, if you could just summarize?

19 A. So, fans are very much aware of what Mr. Orton  
20 looks like, what his tattoos are like. And so, when they  
21 see him in the game, they are expecting him to appear --  
22 they are expecting the character in the game to have the  
23 tattoos that he has in real life, within of course the  
24 limitations of the technology of the time.

25 So, in much older video games, they would not

1 necessarily have the same expectations they have today,  
2 where we can expect things to look pretty close to the real  
3 world.

4 THE COURT: Mr. Friedman, are you about to go into  
5 another area now?

6 MR. FRIEDMAN: Yes, Your Honor, I am.

7 THE COURT: This will be a good time --

8 MR. FRIEDMAN: Okay.

9 THE COURT: -- to stop for the day, before you go  
10 into another area.

11 MR. FRIEDMAN: Yes, I am. Thank you, Your Honor.

12 THE COURT: Okay. All right. Ladies and gentlemen  
13 of the jury, we are going to recess for the day. Please  
14 remember my instructions and admonitions to you. We will  
15 reconvene tomorrow morning at 9:00. I believe you should  
16 try to be here by 8:45.

17 But again, remember my instructions. Do not  
18 conduct any research, discuss the case with anyone, and,  
19 most importantly, have a good evening. All right.

20 COURTROOM DEPUTY: All rise for the jury.

21 (Proceedings continued in open court, jury not  
22 present.)

23 THE COURT: Okay. Do we need to take up anything  
24 else before -- if not, I'll see you at -- I'll be here at  
25 8:30, if we need to take up anything else. And again,

1 remember, if something comes up that's not logistical or  
2 procedural, you should e-mail Miss Hayde.

3 MS. CENDALI: Believe it or not, I don't think we  
4 have an issue for you right now.

5 THE COURT: I don't believe that will still be the  
6 case by the time I get home. No, I'm just joking. Have a  
7 good evening.

8 (Court adjourned at 4:28 p.m.)  
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REPORTER'S CERTIFICATE

I, Christine Dohack LaBuwi, RDR, CRR, Official Court Reporter for the U.S. District Court, Southern District of Illinois, do hereby certify that I reported with mechanical stenography the proceedings contained in pages 1-89; and that the same is a full, true, correct and complete transcript from the record of proceedings in the above-entitled matter.

DATED this 3rd day of October, 2022,

*s/Christine Dohack LaBuwi, RDR, CRR*

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Christine Dohack LaBuwi, RDR, CRR